

Letter of Findings Number: 04-20120308
Use Tax
For Tax Years 2009 and 2010

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ISSUE

I. Use Tax—Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#); [45 IAC 2.2-5-36](#).

Taxpayer protests the assessment of use tax on multiple purchases.

STATEMENT OF FACTS

Taxpayer is an Indiana business in the medical industry. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not paid sales tax or remitted use tax on certain purchases during the tax years during the audit years of 2009 and 2010. The Department therefore issued proposed assessments for use tax and interest on those purchases which it determined were subject to sales and use taxes for those years. Taxpayer protested the imposition of use tax on some of its purchases which the Department included as taxable. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Use Tax—Imposition.

DISCUSSION

Taxpayer protests the imposition of use tax on certain purchases which the Department determined were subject to sales and use taxes for the tax years 2009 and 2010. The Department based its determination on the grounds that there was no documentation available to substantiate that the purchased items had either had sales or use tax paid, or that the items had been used in an exempt manner, or that the items had been resold. As delineated in Taxpayer's September 13, 2012, post-hearing letter, Taxpayer protests that some of the items included as taxable in the Department's calculations were actually not taxable. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
 - (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.
- (Emphasis added).

Use tax is imposed under IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

[45 IAC 2.2-3-4](#) further explains:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is used, stored, or consumed in Indiana, use tax is due unless sales tax was paid at the time of the transaction. In this case, the Department listed several categories of tangible personal property as subject to sales and use tax. Taxpayer protests that the items in some of these categories were actually not subject to sales and use taxes.

The first category of items under protest concerns purchases which Taxpayer made from a specific vendor ("Vendor"). Vendor supplied items used in Taxpayer's medical business. Taxpayer states that Vendor charged sales tax on items Vendor considered to be taxable and did not charge sales tax on items Vendor considered to be non-taxable. Taxpayer provided invoices supporting its position.

The Department refers to [45 IAC 2.2-5-36](#), which states:

- (a) The gross retail tax shall apply to the following purchase transactions made by licensed practitioners:
 - (1) All office furniture, equipment and supplies.
 - (2) Drugs of a type not requiring a prescription, when not purchased for resale.
 - (3) Surgical instruments, equipment and supplies.
 - (4) Bandages, splints, and all other medical supplies consumed in professional use.
 - (5) X-Ray, diathermy, diagnostic equipment, or any other apparatus used in the practice of surgery or

medicine.

(b) The purchase of items for resale by the physician or surgeon. In order to resell items the practitioner must be licensed as a retail merchant, and must quote the selling price of any items separately from the charge for professional service.

(Emphasis added).

Taxpayer argues that Vendor determined taxable and non-taxable items and charged sales tax accordingly. The Department notes that the audit listed specific items which the Department considered taxable but upon which sales tax had not been charged and imposed use tax on those items. The items listed in the audit report are medical supplies consumed in professional use and, as provided by [45 IAC 2.2-5-36](#), are subject to sales or use tax. Taxpayer has not met the burden of proving the proposed assessments wrong, as provided by IC § 6-8.1-5-1(c).

The next category of items under protest consists of charges on an "Advanta" credit card. Taxpayer states that the majority of purchases paid for with this card were from Vendor discussed above and from local merchants. Taxpayer argues that Vendor or the local merchants would have charged sales tax at the time of purchase of any tangible personal property. As discussed above, Vendor did not charge sales tax on all taxable sales and use tax was properly imposed on additional purchases from Vendor. Regarding the purchases from local merchants, Taxpayer was unable to provide any documentation establishing that sales tax was paid at the time of purchase. Taxpayer has not met the burden of proving the proposed assessments wrong, as provided by IC § 6-8.1-5-1(c).

The next category of items under protest consists of payments to 3M Unitek. Taxpayer states that primarily the only costs associated with sales tax would be shipping costs. A review of the invoices provided in the course of the protest process and of the audit report shows that the invoices do not match the amounts listed in the audit report. Also, the one invoice that lists a charged amount for tangible personal property only lists sales tax charged on the delivery charge. The tangible personal property in question on this invoice is for medical supplies consumed in professional use which, as provided by [45 IAC 2.2-5-36](#), are subject to sales or use tax. In this case, the documentation supplied does not prove that the proposed assessments are wrong, as required by IC § 6-8.1-5-1(c).

The next item under protest is an invoice from Avaya upon which the Department determined that sales tax had not been paid at the time of purchase. As part of the protest process, Taxpayer provided sufficient documentation to show that the amount it paid its vendor in this case was the same as the amount it paid its vendor every month and that each monthly payment included separately stated sales tax. Therefore, Taxpayer has met the burden imposed by IC § 6-8.1-5-1(c) of proving the proposed assessment of use tax on this particular monthly payment incorrect.

The next category of items under protest consists of items purchased with cash but for which Taxpayer had no receipts or invoices to show that sales tax was paid at the time of purchase. Taxpayer states that sales tax must have been paid on these purchases and that use tax should therefore not be paid. Again, the Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, and in this case Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c).

The next category of items under protest consists of a First National credit card used primarily to purchase items from Vendor discussed above. As discussed above, the Department's adjustments regarding purchases from Vendor are correct. However, Taxpayer argues that these amounts should be considered as already counted once in the Department's taxable calculations. A review of the documentation submitted in the protest process does not establish that the amounts paid to First National correspond to purchases from Vendor. Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c).

The next category of items under protest consists of payments made to a locksmith service. Taxpayer states that no tangible personal property was purchased, therefore no sales or use tax is due. Taxpayer was unable to provide invoices or other form of documentation to establish that only services were provided in these transactions. Therefore, Taxpayer has not met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

In conclusion, Taxpayer has not met the burden of proving the proposed assessments wrong for most of the items under protest. Taxpayer is sustained regarding the Avaya invoice. Taxpayer's protest is denied in all other regards.

FINDING

Taxpayer's protest is denied in part and sustained in part, as described above.

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